7

Full Name	**Ronel Berg**
Student Number	**VSXRON001**
Degree	**LLM – Criminal law and Criminology**

Title **"CHILDREN SHOULD BE SEEN AND NOT HEARD"**

A re-evaluation of certain ancient rules of evidence and procedure that discriminate against the abused child.

Course Number	**CRI 602W**
Supervisor	**Prof. D Van Zyl Smit**
Date	**15 February 1999**

"Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses."

"CHILDREN SHOULD BE SEEN AND NOT HEARD."

A re-evaluation of certain ancient rules of evidence and procedure that discriminate against the abused child.

INDEX

CONTENTS PAGE

I. INTRODUCTION

"At the southern tip of the continent of Africa, a rich reward is in the making. This reward will not be measured in money.....It will and must be measured by the happiness and welfare of the children, at once the most vulnerable citizens in any society and the greatest of our treasures. The children must, at last, play in the open veld, no longer tortured by the pangs of hunger, or ravaged by disease, or threatened with the scourge of ignorance, molestation and abuse, and no longer required to engage in deeds whose gravity exceeds the demands of their tender years.

In front of this distinguished audience, we commit the new South Africa to the relentless pursuit of the purposes defined in the World Declaration on the Survival, Protection and Development of the Child."

Nelson Mandela

Excerpt from Nobel Peace Prize Acceptance Speech

10 December 1993

The world as well as the nation welcomed these words a little over five years ago. As a professional in the field of child protection services however, one cannot but query when the relentless pursuit of the protection of the child, particularly the child victim of sexual abuse, is set to begin.

The South African media has recently reflected that the reported cases of child abuse are growing at an alarming rate.[1] This increase has brought with it an increase in the number of children who testify in court, which in turn has drawn attention to the inability of the criminal justice system to protect the child complainant.[2]

There can be no doubt from the point of view of a prosecutor, that a case involving the sexual abuse of a child is the most difficult to try. Apart from the routine lack of conclusive medical evidence or eyewitness testimony, the case invariably rests on the evidence of a traumatised, frightened young child.

In an attempt to strike a balance between the need to protect a child witness in the adversarial system, and the need to ensure that an accused is given a fair trial, the Legislature opted for a system of 'intermediaries' and the use of closed circuit

---

[1] SALC Issue Paper 10 Sexual Offences against Children (31 May 1997) at p 15. See also "Shocking spate of child abuse" **Sunday Times Metro**, 15 November 1998, p 4; "Condoms for children – Prostitutes as young as 9 ply their trade in Cape Town" **Sunday Times Metro**, 15 November 1998, p 1; "He owns a boat and a Merc-and he's charged with raping a 6-year-old" **Sunday Times Metro**, 15 November 1998 p 2

[2] PJ Schwikkard 'The Abused child A few rules of evidence considered' (1996) *Acta Juridica* 148

television.[3] These measures will no doubt prove beneficial in minimizing the trauma and the treatment of the child in the courtroom. The benefit however, may well prove short-lived if another area of difficulty is not urgently addressed.

It will be argued, after a brief comparative analysis of evidentiary laws relating to children's evidence in sexual abuse cases, and a reflection of recent empirical research on children's evidence, that it is high time to re-visit certain outdated and prejudicial rules of evidence that apply in these cases. In addition, the question as to whether these rules are necessary to protect the legitimate rights of the accused will be considered.

The arguments presented in this paper are confined to the arena of criminal proceedings, and more specifically, cases of sexual abuse of children. Any reference to 'child' or 'children' refers to a person under the age of eighteen (18) years.[4]

The first of these rules, namely the competency rule, in effect, compels a court to preclude a child from testifying, even when the child is the only person who knows what happened, and is able to give a relevant and understandable version of events.[5] The second, namely the cautionary rule, compels a court not only to approach the child's

---

[3] Section 170 (A) of the Criminal Procedure Act 51 of 1977, which came into operation on 30 July 1993

[4] Section 290 of the Criminal Procedure Act 51 of 1977; Section 28(3) of The Constitution of the Republic of South Africa No 108 of 1996.

[5] Du Toit et al *Commentary on the Criminal Procedure Act* p 22-20

evidence with caution, but to be hypercritical in its scrutiny of the evidence,[6] simply because the witness is a child.

It will be argued that these rules have no rational foundation and no place in our constitutional democracy. This paper will attempt to show that the *de facto* application of these rules discriminate against children as a class of persons, and institutionalise the inequalities between the adult perpetrator and the child victim.

As long as this system is allowed to prevail, the potential for successful prosecutions will not increase, and the child's constitutional rights to equality before the law, and freedom from abuse will be worth little more than the paper they are written on.

II. THE COMPETENCY REQUIREMENT

(1) History and Origin

The competency requirement, which is aimed at establishing the competence of a witness to testify, has its origin in English law, like so many other areas of South African law. Since the eighteenth century in England the rule has been that all witnesses

---

[6] *S v Manda* 1951 (3) SA 158 (A) at 163C-E

must give evidence under oath, and be competent to do so.[7] This meant that they must understand the nature of the oath.[8] Prior to the eighteenth century, English courts were prepared to listen to the unsworn evidence of children even if they failed the competency examination.[9] Their ignorance of an oath was treated as something that affected the weight to be put on their evidence only, as is apparent from the writings of Sir Mathew Hale in 1736:

> 'If the rape be committed upon a child under twelve years old, whether or how she may be admitted to give evidence may be considerable. It seems to me, that if it appear to the court, that she hath the sense and understanding and she knows and considers the obligation of an oath, tho she be under twelve years, she may be sworn. But if it be an infant of such tender years, that in point of discretion the court sees it unfit to swear her, yet I think she ought to be heard without oath to give the court information, tho singly of itself it ought not to move the jury to convict the offender...'[10]

Hale goes on to explain that the same practise prevailed not only in rape cases, but also in cases of 'buggery, witchcraft, and such crimes which are practised upon children.'[11]

---

[7] JR Spencer and R Flin *The Evidence Of Children. The law and the psychology* 2ed (1993) 46
[8] Ibid
[9] JR Spencer and R Flin (1993) 47
[10] Sir M Hale *History of the Pleas of the Crown* (1736) 634
[11] Hale (1736) 284. See also JR Spencer and R Flin (1993) 47

These old and more liberal rules about child witnesses came to an abrupt end in the latter half of the eighteenth century with the case of *Brasier*.[12]

Brasier was a soldier charged with assaulting and attempting to rape a five-year-old girl. He was convicted by a jury without the evidence of the child herself ever being placed before the court. Her version was presented to the court entirely in the form of hearsay evidence. When the matter was referred to the judges in London – a procedure similar to the appeal procedure for criminal cases in South African law – they condemned the procedure followed at the trial. The result was two fold: the accused was pardoned, and a restrictive rule of evidence regarding children - the competency requirement, was introduced.

It was decided in *Brasier* that no evidence could be given otherwise than on oath, and that before anyone was sworn in as a witness, they had to understand the nature of the oath.[13] In those days this meant 'that they had to be able to explain to the judge that they would burn in hell for ever if they lied.'[14] One can only imagine the extreme difficulties this rule must have caused in cases of child abuse.

The competency requirement came under attack in the late nineteenth century. The

---

[12] (1779) 1 East PC 443
[13] *Brasier* (supra) 444
[14] JR Spencer 'Children's evidence in legal proceedings in England' in *Children's Evidence in Legal Proceedings. An International Perspective* (1989) 113 at 115

newly formed National Society for the Prevention of Cruelty to Children, pressurized the English Parliament to include a provision in the Criminal Law Amendment Act of 1885, that enabled young girl complainants in sexual offences to give unsworn evidence.[15] According to Spencer and Flin,[16] the result was a rapid increase in successful prosecutions for assaults on children. The provision was eventually extended to allow any child in criminal proceedings to give unsworn evidence, as long as the judge was satisfied 'that the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.'[17]

Over the years, the rules about the competency of children to give evidence in criminal proceedings underwent a number of statutory and common-law changes. These included a watering down of the test a child had to pass before being allowed to give evidence on oath, and the imposition of an age limit (of six years) below which children were forbidden to give evidence at all.[18] The most recent and important change has been the abolition of the competency requirement. In criminal cases the current position is that all children under the age of fourteen must give their evidence

[15] JR Spencer (1989) 115
[16] JR Spencer and R Flin (1993) 50
[17] s38 of the Children and Young Persons Act 1933 (later repealed by s52 of the Criminal Justice Act 1991)
[18] For a full discussion of the major developments regarding the competency requirement in English law from 1933, see JR Spencer (1989) 115-117 and JR Spencer and R Flin (1993) 50-54; 62-65

unsworn.[19] The relevant section reads as follows:

'52(1) After section 33 of the 1988 Act there shall be inserted the following section -

Evidence given by children

33A-(1) A child's evidence in criminal proceedings shall be given unsworn.

(2) A deposition of a child's unsworn evidence may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.

(3) In this section 'child' means a person under fourteen years of age.

(2) Subsection (1) of section 38 of the 1933 Act (evidence of child of tender years to be given on oath or in certain circumstances unsworn) shall cease to have effect; and accordingly the power of the court in any criminal proceedings to determine that a particular person is not competent to give evidence shall apply to children of tender years as it applies to other persons.'

This makes it absolutely clear that a judge no longer needs to be satisfied that a child understands what it means to speak the truth before allowing the child to testify, as there is no longer a duty to routinely inquire into the competence of child witnesses as a group. This amendment however, does not mean that a court is obliged to consider

[19] s52(1) of The Criminal Justice Act 1991

the evidence of children who are clearly incoherent in their testimony, or unable to communicate in an understandable way. The section makes it clear that a court retains the power to declare an individual child incompetent. The difference however, is that the court will only be called upon to decide the issue of competency, if doubts arise *after* the child begins to testify. This legislation has in effect; put to rest the archaic belief that children below a certain age or level of understanding are simply not worth listening to.

(2) South African Law

The evidence of children in South African law is treated with circumspection. Child witnesses have as a class, been referred to as unreliable,[20] imaginative and open to suggestion,[21] and untrustworthy,[22] to name but a few commonly used adjectives.

In the light of this approach, it comes as a pleasant surprise that our law does not fix the age at which children become competent witnesses. In addition, children are permitted to give unsworn evidence, which is not accorded less weight than evidence given under oath.[23] This seemingly favourable and generous approach however, is severely curtailed by the requirement that a child witness must pass a 'test' before the evidence can be received.

---

[20] Hoffman and Zeffert *The South African Law of Evidence* 4ed (1988) 581
[21] *Rex v Manda* (supra) at 163
[22] *Woji v Santam* 1981 (1) SA 1021 (A) at 1028
[23] Section 164 of the Criminal Procedure Act 51 of 1977

In terms of South African criminal procedure, which is governed by the Criminal Procedure Act 51 of 1977 (the Act), it is pre-emptory, subject to two provisions of the statute,[24] that all witnesses in criminal trials be examined under oath.[25] As regards the purpose of administering the oath to a witness in a criminal trial, Van Winsen J, in *S v L*[26] said that:

> 'Dit..... daarop gemik is om 'n beroep op 'n persoon se gewete en sy godsdienstige oortuiging en met behulp van strafregtelike sanksies te probeer verseker dat slegs die waarheid in die volle sin van die woord deur getuienis in die howe verkondig word.'[27]

This has led to the firm belief that the above purpose is not attainable where a witness lacks the capacity to understand and assume the religious sanction of the oath.[28] Accordingly, the Legislature has made provision in terms of section 164 of the Act, for the admissibility of unsworn or unaffirmed evidence for certain groups of witnesses, one of which are children.

Subsection (1) of section 164 of the Act provides that 'any person who from ignorance arising from youth, defective education or any other cause is found not to understand

---

[24] Sections 163 and 164
[25] *S v Mashava* 1994 (1) SACR 224 (T) at 228C. See also *S v V* 1998 (2) SACR 651 at 652e-f
[26] 1973 (1) SA 344 (C)
[27] *S v L* (supra) at 347H
[28] *Rex v Umhlahlo and Nokusa* 1904 NLR 264 at 268

the nature and import of the oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation, provided that such person shall be admonished by the presiding officer to speak the truth, the whole truth and nothing but the truth.'

The court, after conducting a competency examination, decides whether a child may give evidence, and whether it will be on oath, or unsworn. Before a court administers an oath to a child it must establish whether the witness understands the meaning of, and has the capacity to appreciate and accept the religious sanction of the oath. If in the opinion of the court, the child has this capacity, she will be permitted to testify on oath. If not, then it must be established (again in the opinion of the court), whether the witness can understand what it means to tell the truth. If so, the witness will be permitted to give unsworn evidence in terms of section 164 of the Act. If not, the witness will be pronounced incapable of giving evidence, and will not be permitted to testify.[29] These obligatory inquiries constitute what is referred to as the 'competency test.'[30]

Unlike children, adult witnesses are presumed to be competent, and an inquiry will only take place where one of the parties alleges incompetence, in which case the party who alleges incompetence bears the onus of proof.[31] This may result in one or two inquiries: an inquiry into whether the witness understands the nature of the oath and / or an inquiry

[29] Du Toit et al (n 5) 22-20
[30] PJ Schwikkard (n 2) 151
[31] Section 192 of the Criminal Procedure Act 51 of 1977

into the ability of the witness to communicate. Where adults do not understand the nature of the oath, they too may be admonished to tell the truth, and give unsworn evidence.[32]

The purpose of admonishing a witness to tell the truth, or administering the oath, as is apparent from *S v L*,[33] is to encourage truthful testimony, but the former is certainly no guarantee of the latter. In addition, when a court is tasked with making credibility findings in respect of witnesses, very little reliance if any, is placed on the fact that a witness took an oath or was admonished to tell the truth. It is common knowledge that witnesses, who solemnly swear to tell the truth, lie blatantly under oath, for a variety of reasons. Why then do our courts feel that the credibility of a child can only be assessed if the child understands, and articulates its understanding of the duty to speak the truth?

The test that is used to evaluate the child's competency is based on the witness's understanding and interpretation of abstract notions. In addition, it is both administered and evaluated by judges and magistrates who have no formal training in matters relating to child psychology or the intellectual development of children. There are no guidelines or formulae to assist presiding officers or the child witness in the competency inquiry. The usual procedure is for the judge or magistrate to question the child. In practise, judges and magistrates do little more than simply ask the child a few personal details (such as her name, her age, details of siblings, or school etc), and to explain concepts

[32] Section 164 of the Criminal Procedure Act 51 of 1977
[33] *S v L* (supra) (n 26)

such as 'the truth' or 'falsehood'. The following example of the exact line of questioning used, (which is rarely recorded in our law reports), is cited in the Appellate Division matter of S *v T*:[34]

> '**Hof**: J. jy moenie bang wees nie. Jy moet net praat wat jy weet wat gedoen is en wat jy gesien het. Kan jy verstaan, J? Kan jy verstaan jy moet net praat wat die waarheid is wat iemand gedoen het wat jy gesien het en wat gesê word. Ek kry die indruk dat sy nie verstaan wat die aard van haar getuienis is nie.
>
> **Staatsaanklaer**: Op hierdie stadium deel ek daardie indruk.
>
> **Hof**: Ons kan maar sien wat sy antwoord maar ek dink sy het nie 'n begrip wat bedoel word deur die waarheid of enigiets van die aard, sy is te jonk. Is dit nie u indruk ook nie?
>
> **Staatsaanklaer**: Dit is die indruk wat ek ook kry.
>
> **Hof**: Ja, ons kan maar net ons bes doen…'[35]

In this particular case, the child concerned was five years old, and the complainant in a rape matter. One does not need a degree in child psychology to realise that the

---

[34] *S v T* 1973 (3) SA 794 (A)
[35] *S v T* (supra) at 796

questions posed would have made little sense to one in her situation. Even an adult with no knowledge of the court process may have struggled to understand what the judge was trying to say. Besides her tender age, her response or lack thereof was no doubt also influenced by her unfamiliar and intimidating surroundings. It is no small wonder that she did not answer the court. The trial judge nevertheless sympathised with the witness and allowed her to give unsworn evidence, using her mother as an intermediary. On appeal, Appellant's counsel raised the point that the complainant was not a competent witness, as she had been unable to tell the difference between the truth and a falsehood. The appeal was successful and the conviction was overturned. This decision confirmed earlier matters of a similar nature,[36] and set the stage for many years to come.

A more recent example cited below, illustrates yet again the difficulty that presiding officers have in trying to formulate appropriate questions when testing the competency of young children. This difficulty invariably leads to a technical irregularity in the proceedings, which in turn exposes the conviction to challenge.

In the matter of *S v N*,[37] an appeal against a conviction and sentence on a charge of indecent assault, the complainant was a young girl of ten years old at the time of the trial. When she took the witness stand, the Regional Court magistrate asked her a few questions. These related to her school, whether she attended church or not, whether she

[36] *S v L* (supra) (n 26) ; *Rex v Manda* (supra) (n 6)
[37] 1996 (2) SACR 225 (C)

was aware of her surroundings, and what would happen in the event of her lying to her father. Her answers were short, but coherent and understandable. Her response to the final question was, 'hy sal my pak gee.'[38] Thereafter the magistrate arrived at the conclusion that she understood the distinction between the truth and lies, and he decided to administer the oath to her.[39]

The appeal court found that the enquiry was not nearly sufficient to support the conclusion that the complainant understood the nature and import of the oath. In addition the court found that the magistrate's view was based on a misconception of the facts, and 'a misguided belief that it follows from the fact that a witness can distinguish between the truth and falsity that he or she understands the nature and import of the oath.'[40] The court finally held that the complainant had not been placed under oath properly, and that her evidence lacked the status and character of evidence. The conviction and the sentence were set aside.

The examples cited serve to illustrate that the competency test may well operate to exclude reliable testimony of younger children, and in so doing, perpetuate the cycle of child abusers going unpunished for lack of evidence.

---

[38] *S v N* (supra) at 227
[39] *S v N* (supra) at 229
[40] *S v N* (supra) at 230-231

(3) The Relevancy Of The Requirement.

Extensive research in the English speaking world has been conducted to assess children's understanding of legal terminology. The earliest of these recorded studies were conducted in England in 1959, and the more recent in Canada in 1993.[41] On the aspect of abstract concepts, they all revealed that children have difficulty in explaining concepts such as 'truth', 'promise' and 'God', and that the younger the child, the greater the difficulty.[42]

Very recently, the first exploratory study of its kind was conducted in South Africa, and was aimed at establishing how children in the South African context perceive the court process, by testing their knowledge of legal terms and procedures.[43] The first study used white school children between the ages of 8 and 14, with equal numbers of males and females in each age group. The second study incorporated children from a different cultural group, to test the differences in perceptions in children from diverse cultural backgrounds. The children in the second study were between the ages of 7 and 16 years, and recruited from a single primary school in a black township. Both studies were

---

[41] For a detailed comparative analysis see Muller and Tait 'A prosecutor is a person who cuts off your head': Children's perceptions of the legal process. (1997) *SALJ* 593-597

[42] Ibid

[43] Ibid and Muller and Tait 'Are Children beheaded and fed to wild animals? A study of the perceptions of South African children relating to the judicial process' (1998) 116 *SALJ* 447

confined to the Port Elizabeth area.[44] The children were asked to complete a questionnaire aimed at assessing their knowledge of legal terms, including the abstract concepts of 'truth', 'lie', 'promise' and 'oath.' In total they were asked to explain twenty legal terms as well as answer five questions aimed at assessing their knowledge of procedure. For the purpose of this paper, reference will only be made to the test results regarding abstract concepts.

The area of 'abstract concepts' was the only area of the study that produced results unrelated to the differences in the children's social and cultural backgrounds. In fact the findings of the two studies are almost identical, and read as follows:

> 'It was evident that the children had great difficulty explaining abstract concepts. One child actually wrote: 'I know what it is, but cannot explain it.' Very few children were able to explain the difference between the truth and a lie, often merely describing them as opposites, that is, 'a lie is not the truth', and 'truth is someone telling the truth', whilst 'lying is someone telling lies'. This supports the finding of psychological research that children have great difficulty in explaining abstract concepts'.[45]

[44] Muller and Tait (n 43) 448
[45] Muller and Tait (n 41) 602 and Muller and Tait (n 43) 455

The overall result of both studies showed a clear developmental trend with increased knowledge of terminology in older children.[46] In the first study, (the white children), the researchers recorded that only 52% of the 13-year-olds understood the meaning of the word 'oath'. The younger children had virtually no knowledge of it.[47] No similar calculation was made regarding the second study.

The results of these and other like studies have important implications for the competency examination. The point is quite simply, that if children do not understand the abstract terms used in the competency test (oath, truth, lies, falsehood, promise), it is time to query the purpose and the relevancy of the test.

(4) Criticisms Of The Requirement

The competency requirement in the context of young children has proved both inappropriate and unhelpful. In the first place, the effect of this test can be disastrous, because the only person (other than the perpetrator), who is able to tell the court what happened, can be precluded from testifying. Even if medical evidence unequivocally confirms that the child was raped, it does not point to the accused as the perpetrator. Without the child's evidence, there simply is no case.

---

[46] Mullet and Tait (n 43) 449
[47] Muller and Tait (n 41) 602

Consider the following absurdity that this requirement may produce: if a police tracker dog finds a rape suspect by tracking a scent, this fact can be put before the court. It will simply be regarded as part of the policeman dog-handler's evidence in chief. Yet, if the young victim herself points out the suspect to the policeman, a competency requirement might compel the court to exclude the evidence of the child, and the rule against the admission of hearsay evidence, would prevent the policeman from testifying to the fact!

Common sense dictates that a child who is unable to communicate or give an understandable version of events will be of little assistance to the court. By the same token however, one who is able to give relevant and understandable testimony should be heard, irrespective of an ability or lack thereof, to distinguish between the truth and falsehood. Failure to allow this is nothing short of a miscarriage of justice.

In the second place, the results of the test have no bearing on the child's ability to give a reliable account of relevant events, as the line drawn between those competent, and those incompetent to testify, is in fact unrelated to the likelihood that they will tell the truth. The competency test can tell the court nothing about the reliability of a child witness. It is designed to see if the child will undertake to tell the truth, and not whether in fact, the truth will be told if the child passes the test. Consider the following examples:[48]

---

[48] The examples are drawn from the author's ten years experience as a prosecutor (1988-1998) in the Lower and High courts in Cape Town.

(i) Lisa is a five year old little girl who has been repeatedly sexually abused by her uncle, in whose care she is left during the day. Lisa has given both her mother and a social worker a reliable and understandable account of the events in question. The uncle has been charged with numerous counts of indecent assault.

(ii) Megan is a fifteen-year-old sexually active teenager. Her parents returned home unexpectedly one evening, and walked in on her and her twenty-year-old lover. In an attempt to explain the situation, Megan alleged that she had been raped, and her parents wasted no time in contacting the police and laying a charge.

Lisa does not understand, nor is she able to articulate abstract concepts such as 'lie', 'truth', 'promise', or 'oath'. She will either be found to be an incompetent witness and precluded from testifying, or, should the presiding officer allow her to testify and a conviction ensues, the matter will most certainly be overturned on appeal, on the basis of the argument in *S v T*.[49] Either way, the perpetrator remains unaffected, untreated, and unpunished, while Lisa remains unprotected by the law.

Megan, on the other hand, will undoubtedly pass the competency test, and in all probability, give evidence on oath. Her version however, will be extremely unreliable because of an attempt to protect her lover, or, it will be downright dishonest, in an attempt to protect herself.

---

[49] *S v T* (supra) (n 34)

Not only do the above examples illustrate the unfair and unjust operation of this requirement, but they also serve to show just how irrelevant it is. The competency requirement sheds no light whatsoever on reliability, and can never guard against the danger of a lying child.

A third criticism is that the exclusion of evidence of children who fail the competency test is not aligned with the rationale behind the exclusionary rules of evidence. In South African law, evidence is excluded if it is irrelevant,[50] or if it were obtained in a manner that violates a constitutional right of the accused person,[51] or if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.[52] The exclusionary rules operate to protect an accused's right to a fair trial. Excluding the evidence of children who are able to give an understandable and potentially reliable account, but who lack the ability to understand or articulate abstract concepts, cannot by the furthermost stretch of the imagination be justified by the above-mentioned exclusionary rules.

The failure to hear a child, who is able to communicate and give relevant testimony, is a failure to acknowledge the child's right to equality before the law, and freedom from abuse. In addition, the continued application of the rule in the South African legal system puts us far behind developments in other countries in this area of the law.

---

[50] Section 210 of the Criminal Procedure Act 51 of 1977
[51] Section 35(5) of The Constitution of The Republic of South Africa, Act No 108 of 1996
[52] Ibid

(5) Developments in other Jurisdictions

As discussed earlier, the competency requirement has recently seen major changes in England, notably that, with effect from 1 October 1992 the Criminal Justice Act 1991 has abolished the competency requirement for child witnesses in criminal proceedings altogether. Spencer and Flin make the submission that competency requirements in respect of children 'seem to be unknown, at least in modern times, outside common law systems.'[53] It would also appear that elsewhere in the English speaking world, comparable jurisdictions are looking for ways of hearing the testimony of younger witnesses. This has produced a number of official reports of Law Commissions and Law Reform Commissions, most of which have led to legislative changes.[54] The competency rule is in retreat.

In Canada, it was the results of the Badgeley Commission, released in 1984, that led to reforms that affected the rules of evidence for children. The reforms became law on 1 January 1988.[55] In terms of these reforms there is no longer a distinction between sworn and unsworn evidence. Although the statute prescribes that all children under the age of fourteen must undergo the competency test, it has been greatly watered down. The only

[53] Spencer and Flin (1993) 401
[54] Spencer and Flin (1993) 393
[55] Through Bill C-15. See J Wilson 'A perspective on the Canadian position' in *Children's Evidence in Legal Proceedings, an International Perspective* (1989) 147 at 148-149

test for the admissibility of a child's evidence is whether or not a child is able to communicate, and can promise to tell the truth.[56]

In Ireland, a recent statutory amendment allows a criminal court to receive the evidence of a child if the court is satisfied that the child can give a relevant and intelligible account of events.[57]

In South Australia, a 1988 statute allows a court to receive the evidence of a child who lacks the ability to promise to tell the truth, provided there is corroboration.[58]

The trend throughout the common law world seems to be to allow children, however young or immature they are, to give evidence and be heard. In these countries, the age and immaturity of the child witnesses are factors affecting the *reliability*, and not the *admissibility* of their evidence. There is no basis for challenging the soundness of such rationale. When will our Legislature or Judiciary be brave or concerned enough to follow suit?

(6) A Proposal for Reform

The competency requirement as it applies to children in South African law is outdated, irrelevant and prejudicial, especially in the case of younger children. It has no place in

[56] Ibid
[57] Section 27(1) of the Criminal Evidence Act 1992
[58] Spencer and Flin (1993) 402

our law. The case law as well as empirical research referred to earlier, have unequivocally shown that children below a certain age are unable to understand abstract concepts. Making provision for children to give unsworn evidence on the one hand, but requiring them to first pass a test based on an understanding of abstract concepts on the other, is tantamount to making no provision for young witnesses at all.

Children below a certain age should not be permitted to give evidence on oath, as is the case in English law, where the age limit has been set at fourteen. All children who fall into this category should not be required to pass any test to establish competence to testify. A presiding officer should retain the power to declare an individual child incompetent, where such a child is clearly incoherent, or unable to communicate in an understandable way.

Reform along the lines proposed, simply means that a child with an understandable and potentially reliable version will be able to put that version before the court, for consideration together with all the other evidence. It does not mean that the child's evidence will necessarily be accepted by the court, nor does it by any means imply that a conviction will ensue. In addition, the accused person's right to a fair trial, including the right to be presumed innocent and the right to cross-examine the witness, will remain unaffected. At the end of the day, guilt can still only be established if the court is satisfied on the evidence that the case against the accused has been proved beyond a reasonable doubt. It is difficult to see how the abandonment of the competency requirement would affect the legitimate rights of the accused.

There are also strong grounds for arguing that the abandonment of this test would acknowledge the child's right to equality – a right that is blatantly ignored and unjustifiably infringed by the application of this test. This argument will however be canvassed in the final section of this paper.

If a South African child victim of sexual abuse passes the competency test, she has only passed the first hurdle. Although she is permitted to testify, the likelihood of her evidence being accepted by the court is not very high. This is because of yet another archaic and prejudicial law of evidence that operates in cases involving children.

III THE CAUTIONARY RULE

(1) The Cautionary Rules in general

The cautionary rule that operates in the case of the evidence of young children is one of a number of such rules that are well-established common law rules of practise, developed to assist the court in deciding whether or not guilt has been proved beyond a reasonable doubt. A cautionary approach must be followed whenever the evidence of *certain* witnesses is evaluated. The rules emanate from English law, and their origin was the practise of warning a jury that certain witnesses, notably accomplices, young children and complainants in sexual cases, could not safely be relied upon 'without

corroboration or some other indication of trustworthiness.'[59] In South African law an approach of caution is also required in the case of single witnesses, and identification evidence.

The cautionary rules have survived the abolition of the jury system that brought them into being, as well as the radical transformation of our legal system in a new and democratised South Africa. The greatest irony is perhaps the fact that the rules have been abolished in English Law.[60] Surely the time has come to challenge the need, the purpose, and the continued existence of these somewhat aged practices in our law?

The 'collective wisdom of judges'[61] and 'the accumulated experience of courts of law'[62] have often been cited in an attempt to justify the cautionary rules. In the case of an *accomplice*, for example, a cautionary approach has been found by our courts to be imperative, because it has been accepted that 'an accomplice is a witness with a possible motive to tell lies about an innocent accused.'[63]The evidence of an accessory after the fact also falls within the ambit of this cautionary rule,[64] because of the assumption of unreliability. Whether this assumption has any factual or reality based

---

[59] Hoffman and Zeffert (1988) 572
[60] A more detailed discussion of this development follows on p 39ff
[61] Hoffman and Zeffert (1988) 572
[62] Schwikkard. Skeen. Van Der Merwe *Principles of Evidence* (1997) 388
[63] *S v Masuku* 1969 (2) SA 375 (N) 375-7. See also *S v Hlapezula & others* 1965 (4) SA 439 A; *S v Francis* 1991 SACR 198 (A)
[64] *R v Nhleko* 1960 (4) SA 712 (A)

foundation is unknown. There has certainly been no reference to empirical research by the courts. The same can be said for the case of children.

Children have historically been viewed as unreliable witnesses. Their evidence is routinely scrutinised with extreme caution because of the belief that they, as a group, are prone to vivid imaginations and suggestibility.[65]

The rule in respect of *sexual offences* was inextricably linked to the ancient notion that women are habitually inclined to lie about being raped.[66] The case law referred to shows that supporters of this rule have claimed that it is necessary, because the normal safeguards of cross-examination and the single witness cautionary rule are not enough. 'The assumption is not just that women lie, but that women are extremely good liars.'[67]

Appellate courts have often cautioned against reliance on the evidence of a *single witness*, even although our Criminal Procedure Act provides for an accused to be convicted of any offence on the single evidence of a competent witness.[68] Of all the cautionary rules, it is submitted that this is one of perhaps two, (the other relating to identification evidence), that reflects common sense – recognition of the danger inherent in having to rely on the evidence of one person. Whether the reflection of

---

[65] *R v Manda* (supra) (n 6)
[66] R *v W* 1949 (3) SA 772 (A); *S v F* 1989 (3) SA 847 (A); *S v Balhuber* 1987 (1) PH H22 (H)
[67] V Bronstein 'The Cautionary Rule: An Aged Principle in search of Contemorary Justification' (1992) *SAJHR* 556 at 557-8
[68] Section 208 of the criminal Procedure Act 51 of 1977

common sense makes any difference to the greater debate concerning the usefulness and purpose of the continued existence of the cautionary rules in general is doubtful.

As regards evidence of *identification*, our courts have held that it must be approached with caution, because it has been shown that for various reasons the identifying witness may be mistaken.[69]

In practise the application of the rules means that the evidence of certain categories of witnesses is approached differently, because of an underlying assumption of unreliability. Their evidence is examined with a higher degree of care in order to avoid possible injustice to the accused.

This general approach in effect constitutes an open challenge to the time-honoured principle that each case should be determined on its own merits. In addition, the purpose of the rules (safeguarding against the risk of a wrongful conviction) must surely be brought into question in a post apartheid South Africa, where an accused person now enjoys entrenched constitutional rights to a fair trial.[70]

There is no doubt that the cautionary rules have created confusion, and have inevitably led to uneven interpretation. Our courts have repeatedly stated that the rules exist only to provide guidance in establishing whether or not guilt has been proved beyond a

---

[69] *S v Mthetwa* 1972 (3) SA 766 (A)
[70] Section 35 (3) of The Constitution of the Republic of South Africa, 1996

reasonable doubt.[71] Yet, this has not been the case. In some cases the rules have been applied as rigid tests that determine questions of guilt and innocence,[72] while in others they have been regarded as a 'formulae'[73] which a judge or magistrate merely refers to during the course of giving judgement.[74]

Some of the rules, namely the rules applicable to the evidence of children and complainants in sexual offences, have been highly criticised for being superfluous, discriminatory in nature, and lacking a rational basis for their existence.[75] Recently, the Supreme Court of Appeal accepted such arguments in a matter involving the cautionary rule in respect of a complainant in a sexual case.[76] The unanimous finding of a full bench was that this rule 'is based on an irrational and outdated perception, and that it unjustly stereotypes complainants in sexual assault cases as particularly unreliable.'[77]

As a consequence of this decision, there is no longer an obligation on a court to approach the evidence of complainants in sexual cases with caution. This case has not abolished the approach of caution per se, as the evidence in a particular case may call

---

[71] See *S v Snyman* 1968 (2) SA 582 (A) at 585G; *S v Artman* 1968 (3) SA 339 (A) at 341B
[72] See *R v W* (supra) (n 66) at 783; *S v F* (supra) (n 66) at 853E
[73] Hoffman and Zeffert (1988) 572
[74] See *S v Mgengwana* 1964 (2) SA 149 (C) at 150C; *S v Avon Bottle Store (Pty) Ltd* 1963 (2) SA 389 (A) at 393H
[75] S Jagwanth and P Schwikkard 'An Unconstitutional Cautionary Rule' (1998) *SACJ* 87; V Bronstein 'The cautionary rule: an aged principle in search of contemporary justification'(1992) 8 *SAJHR* 558; P Schwikkard 'the abused child: a few rules of evidence considered' (1996) *Acta Juridica* 148
[76] *R v J* 1998 (2) SA 984 (SCA)
[77] *R v J* 1998 (supra) at 984

for a cautionary approach. The case has simply put to rest the illogical and somewhat confusing application of a general cautionary rule. Unfortunately such a general approach remains in the other categories of witnesses, including young children.

(2) The Evidence of Young Children

The justification for a cautionary rule in the case of young children is detailed in a number of the leading cases on the issue. It is easier to understand the criticisms that will be raised in this paper if attention is paid to the traditional formulation of the rule.

In 1927, the learned Judge-President Gardiner, in *R v Bell*[78] said:

> 'It is properly argued that it is very unlikely that a child of this age should make up such a story. There is substance in that argument, but there remains the possibility that the child might make up the story. Children see animals having connection with one another: they sometimes mix with children badly brought up and are apt to hear such things talked about, and it is not uncommon for children, even at this age, to imitate, or to have knowledge of sexual acts.'[79]

The child in this case was a four and a half-year-old girl, and the complainant in an

---

[78] *R v Bell* 1929 CPD 478
[79] *R v Bell* (supra) at 480

indecent assault matter. One can only wonder on what basis the learned judge was inclined to make the comment that, 'it is not uncommon for children of this age to have knowledge of sexual acts,' especially since this was not part of the evidence before the court. This assumption, together with the lack of eyewitness testimony to corroborate the child's version, was used to justify a finding of non-compliance with the required application of caution, and the conviction and sentence were set aside.

Similarly, Schreiner, JA in the 1951 Appellate Division matter of *Rex v Manda* said:

> 'The dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion. It seems to me that the proper approach to a consideration of their evidence is to follow the lines adopted in the case of accomplices and in the case of complainants in charges of sexual assault.'[80]

In this matter, three children were called as witnesses in a murder trial. The older two were reportedly fourteen and six years old, but the court accepted by appearance that they were all a lot younger. Two of the children testified that they had known the appellant before the case arose. There was a minor discrepancy in their evidence regarding whether or not the appellant was wearing shoes. On this point, the learned judge said the following:

---

[80] *R v Manda* (supra) (n 6) at 163

'Such discrepancies might in other circumstances seem to be of little importance but where the evidence of young children is in question, proved uncertainty of observation or recollection reinforces the generally accepted need for caution in relying on their evidence.'[81]

This decision makes it clear that the degree of care adopted may amount to suspicion, not because the evidence calls for it, but because of the status of the witness. Even if the child gives a version that proves to be logical, understandable, and free from *material* inconsistencies, a court, in the light of this judgement is obliged to apply a higher standard of care, than in the case of an adult witness.

In the case of *R v J*[82] Young, J said:

'The imaginativeness and suggestibility of a little child of four is so great, and the tendency of him or her to romance is so marked, that corroboration (except perhaps on a simple fact safely within the child's testimonial competence) is in practice essential. Here the circumstances deposed to were not so simple but such as to give ample scope for suggestion and romancing.'[83]

[81] *Rex v Manda* (supra) at 162
[82] *R v J* 1958 (3) SA 699 (SR)
[83] *R v J* (supra) at 702

Any parent or person in contact with young children would undoubtedly confirm that children have a rich and wonderful imagination. As regards this fact, the judicial pronouncements are accurate. A child's imagination however, is almost always confined to games or stories of fantasy and make-believe. The fact that a child believes in the Tooth Fairy and Father Christmas, or enjoys donning the identity of the hero of the day, cannot justify the belief that the child is prone to fabricating about being the victim of sexual acts, which may be violent and brutal. Nor does it justify the belief that she is equally prone to imagining the identity of the perpetrator, thereby falsely accusing an innocent person. There is with respect, no rationale in such reasoning, yet it forms the basis of an obligatory approach of caution in the case of child witnesses.

The matter of *R v J* referred to above concerned the indecent assault on a four-year-old girl. The accused was a twenty-year-old gardener, employed by the child's parents. Her version was that 'he had taken her to his quarters, removed his trousers, placed his "thing" against her, and she had seen white stuff coming out.'[84] Her eight-year-old sister had looked through the window and witnessed the incident. Both children reported it to their mother when she returned home in the evening. The accused was arrested on the same day, and articles of his clothing were sent to the government analyst. A microscopic investigation revealed seminal stains on his underpants. The accused did not give evidence, or cross-examine the complainant. The conviction and sentence was overturned on appeal. The court found that because the witnesses were children, their evidence could not be accepted without corroboration of the elder child's evidence.

[84] *R v J* (supra) at 700

Once again the need for corroboration was directly linked to the fact that the witnesses were children. This case is another illustration of the fact that the application of caution is not because the witness is shown to be unreliable, but because the witness is assumed to be unreliable.

Similarly, Lewis, AJA in the 1966 matter of *R v J* said:

> 'Generally speaking, in cases involving children of tender years and particularly in sexual cases, it appears that the reason for the special cautionary approach is that, where there is no clear corroborative evidence to show that the offence in question has been committed, then one is faced with the danger that the whole episode complained of may have been a figment of the child's imagination.'[85]

A little further in the judgement, the learned judge goes on to argue just how conceivable it is that a child 'even at the age of the present complainant (10 years and 8 months), ... might have willingly indulged in some form of sexual experience with another child or adolescent of the opposite sex, and that, when forced to explain away the physical evidence of it, she might endeavour to cover up the real truth by making a false allegation of rape against an innocent person.'[86]

Almost ten years later, in the matter of *S v B*[87] Vos, J, made a similar pronouncement:

---

[85] *R v J* 1966 (1) [SR AD] 88 at 91 G-H
[86] *R v J* (supra) at 93 E-G
[87] *S v B* 1976 (2) SA 54 (C)

'We are dealing here with the uncorroborated evidence of young boys. It stands to reason that the court must apply the cautionary rules. The reason for that is pure common sense. They have reached the stage where boys are subject to influences by other people, they live in a world of their own, they imagine things, they suffer hallucinations and the court should therefore be very careful in making up its mind.'[88]

Although it is widely accepted that as a matter of law there is no requirement that the evidence of children has to be corroborated, this case is another example of the fact that in practice some form of corroboration is routinely required.

Corroboration must be evidence that confirms the complainant on a point in dispute, which implicates the accused. It must therefore be evidence that tends to show the commission of the offence charged,[89]or the identity of the perpetrator, or in the case of the rape of a child over the age of twelve years, the absence of consent.[90] Our courts do not regard evidence that a complaint was made immediately after the alleged offence as corroboration of the complainant's evidence. Such evidence will not satisfy the cautionary rule, and will serve only to show the consistency of the complainant's

[88] *S v B* (supra) (n 87) at 57
[89] *R v W* (supra) (n 66)
[90] *R v D and others* 1951 (4) SA 450 (A)

version.[91] In cases of sexual abuse of children, corroboration is extremely difficult to find.

In most cases, because of the nature of the crime, and the circumstances in which it may often be committed, there are no witnesses. Evidence of torn clothes and physical injuries is very often not enough. At best such evidence may confirm that the child has been indecently assaulted or even raped, but this will take the matter no further if the identity of the offender is in dispute, and the child's evidence on this issue is uncorroborated.

In many instances the medical evidence may prove inconclusive, and as such cannot confirm the commission of the offence charged. This often happens in cases of indecent assault, where the physical injuries are of a minor nature, and the clinical examination of the child reveals slight bruising or inflammation of the body part concerned. In such cases, a defence attorney will waste no time in getting the doctor witness to concede to the possibility that something other than the alleged act of indecent assault may have caused the child's injuries. A similar situation may arise where a medical doctor only examines a seriously injured child after the injuries have healed.

In the overwhelming majority of cases of sexual abuse of children, the case rests on the evidence of a frightened, young child, a medical doctor, and the person to whom the

[91] *R v Bell* 1929 CPD 478. See also Hoffman and Zeffert (1988) 580

child first reported the incident. It would seem that the rape and sexual abuse of children, are crimes for which corroboration may be uniquely absent. This is due to no fault of the victim, yet our courts have repeatedly shown that they will not accept the uncorroborated evidence of such a victim.

In both the matter of *R v J* and *R v B* referred to earlier, the learned judges, in commenting on how the cautionary rule may be satisfied, make the point 'that the exercise of caution should not be allowed to displace the exercise of common sense.'[92] In practice common sense appears with respect, to have played no part in the exercise at all. Common sense dictates that a cautionary approach is necessary where the evidence in a particular case requires it, and not where the witnesses belong to a particular class or group.

A more helpful approach is to be found in the dictum of Diemont JA, in *Woji v Santam Insurance Co Ltd*[93] where dealing with a civil case, the learned judge said:

> 'The question which the trial court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears

[92] See *R v J* (supra) (n 85) at 88F-G; See *R v B* (supra) (n 87) at 57H
[93] 1981 (1) SA 1020 (A) at 1020 A-E

intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion to "remember what occurs" while the capacity of narration or communication raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers.....here are other factors.....Does he appear honest.....is there a consciousness of the duty to speak the truth.....At the same time the danger of believing a child where evidence stands alone must not be underrated'

While *Woji* must be welcomed, in that it provides guidance and recognises the individuality of children, 'it is clearly still based on the premise that children are inherently more unreliable than adult witnesses.'[94]

The South African Law Commission in its *Report on the Protection of Child Witnesses*[95] recommended that the cautionary rule be retained. It stated the existing rationale for the rule as follows:

'The cautionary rule regarding children is not based on the conception that children are per se untrustworthy, but on the experience that children are often unreliable witnesses. Although children are good observers, they cannot always interpret events and they may give a wrong connotation to events that they have observed.

[94] PJ Schwikkard (n 2) 154
[95] (Feb 1991) Project 71

Furthermore, children can easily be influenced and intimidated. They often make concessions or change their testimony, especially during cross-examination merely because they think this is expected of them or because they want to put an end to the unpleasant experience of cross-examination.'[96]

It is apparent from the above quotations that the cautionary rule has been moulded by the assumption that children's testimony is less reliable than adults. This appears to be based on misdirected reasoning that children, because they live in a world of make believe and hallucination, are prone to imagine or fabricate incidents of sexual abuse, thereby falsely accusing their assailants.

The result of the application of this cautionary rule is that child witnesses are treated differently. Their evidence is viewed with circumspection, and approached with a far higher degree of scrutiny and care than that of their adult counterparts. Numerous examples of the over-zealous application of this cautionary rule can be found, resulting in a pattern of unsuccessful prosecutions in cases where children have been sexually abused.

(3) Developments in Other Jurisdictions

The first major development in the law in the United Kingdom in this regard is to be

[96] SALC Project 71 at 68

found in the enactment of the Criminal Justice Act 1988. Prior to 1988, it was obligatory in England for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of inter alia, a child, and a complainant in a sexual offence. [97] Section 34(2) of the Criminal Justice Act 1988 provided that:

> 'Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated in relation to cases where such a warning is required *by reason only* that the evidence is the evidence of a child.' (my emphasis).

Although this section abolished the duty to warn where the witness is a child, it did nothing to alter the rule that a jury had to be cautioned against convicting on the uncorroborated evidence of a sexual complainant.

Shortly thereafter came a milestone development with the enactment of sections 32(1), 32(2) and 33 of the Criminal Justice and Public Order Act 1994. Section 32(1) repealed the corroboration requirement applicable to accomplices, and complainants in sexual offences, and section 33 repealed the corroboration requirements under the Sexual Offences Act, 1956.[98] Section 32(2) concerns the evidence of children and reads as follows:

---

[97] R May *Criminal Evidence* (2ed) 1990 at 311

[98] In terms of certain provisions of the Sexual Offences Act 1956, a person could not be convicted of the offence charged on the evidence of one witness, unless the witness was corroborated.

'(2) In section 34(2) of the Criminal Justice Act 1988 (abolition of requirement of corroboration warning in respect of evidence of a child) the words "in relation to" to the end shall be omitted.'

The abrogation of the compulsory warning as contemplated in the sections mentioned above, unequivocally indicates a fundamental shift in the manner in which the judiciary is called upon to view *certain* complainants. Since corroboration is no longer a statutory requirement in cases involving child witnesses, (including child complainants in sexual offences), the conclusion is irresistible that the credibility of such complainants may no longer routinely be called into question merely because of their age or the category they belong to. This serves the important function of ridding the law of its historical prejudicial assumptions concerning such complainants.

The first judicial interpretation of the nature, ambit and meaning of section 32 of the Criminal Justice and Public Order Act 1994 appears in the criminal appeal *R v Makanjoula; R v Easton* [1995] 3 ALL ER 730, a judgement delivered by Lord Taylor CJ. In each case the applicant was convicted of an indecent assault of a young girl. It was argued that although the duty to warn the jury had been abrogated, the considerations which over time had prompted the law to caution against conviction on the uncorroborated evidence of a complainant in a sexual case, could not be said to have disappeared over night. It was accordingly contended that the judge, in the proper exercise of his discretion to tender such a warning, ought to have done so. Holding that

such a practise would render section 32 effectively a dead letter, Lord Taylor CJ held that the issue of a warning, and if so, its strengths and terms would largely depend on the content and manner of a witness's evidence.[99] It is clear that what has been abolished is the general duty on the court to warn in specific instances.

Although this case does not specifically deal with the cautionary rule applicable in the case of young children, it is highly relevant and persuasive for the case of the abused child in South Africa, because it encompasses an entirely fair and rational alternative to evaluating the evidence of the so called 'certain' witnesses.

English criminal law is not unique in its dramatic changes concerning the evidence of children. In New Zealand (in 1989), and in Australia, (in 1991) judges were prohibited from issuing a general warning not to believe a witness simply because he or she was a child.[100]

These changes reflect a change in the public's attitude to the acceptability of the evidence of young children, and the increasing belief that children are no less reliable than their elders.

The modification or abandonment of the English based rules of corroboration has been motivated in part by recent, large scale research showing that children's ability to give

---

[99] *R v Makanjoula; R v Easton* [1995] 3 ALL ER 730 at 732 f-j
[100] Spencer and Flin (1993) 214

reliable evidence has been greatly underestimated.[101] This conclusion has been strengthened by research on the testimony of adults, which has shown that adults are also susceptible to poor memory, suggestion and misinformation.[102] Research of this nature calls into question the whole rationale behind the demand for corroborative evidence to back up a child's testimony. The South African researchers quite pertinently point out that 'it also demands a re-evaluation of the cautionary rule which the court is required to apply in assessing a child's testimony.'[103]

Legal awareness of social science research has not yet manifested itself in South African courts. A recent decision of the Zimbabwean Supreme Court provides a good example of how the application of this knowledge is necessary to reach an 'intelligent conclusion' regarding the evidence of children.[104]

(4) The Zimbabwean case of *S v S*

The appellant in this matter, was a teacher, and had been convicted of the rape of an eleven-year-old schoolgirl who was his pupil. The first ground of appeal was that the trial magistrate had failed to observe the cautionary rule applicable to the evidence of children.[105]

---

[101] Spencer and Flin (1993) 287
[102] Ibid
[103] JC Hammond and E Hammond 'Justice and the Child Witness' (1987) 11 *SACC* 3-4
[104] *S v S* 1995 (1) SACR 51 (ZS) at 60B-C
[105] *S v S* (supra) at 53c

Ebrahim, J examined the application of the cautionary rule regarding the evidence of children, and drawing on the authoritative work of Spencer and Flin,[106] the learned judge identified the six main traditional objections to relying on children's evidence. They were listed as follows: '(a) children's memories are unreliable; (b) children are egocentric; (c) children are highly suggestible; (d) children have difficulty in distinguishing fact from fantasy; (e) children make false allegations; and (f) children do not understand the duty to tell the truth.'[107]

He considered the validity of these objections in the light of research findings on children's cognitive ability, again referring to Spencer and Flin. In doing so he made the following comments. In respect of (a), 'research has shown that children generally have a good recall of central events but a poorer memory for detail and evidence of surrounding occurrences.'[108] He found that this was borne out in the case before him where for example, the complainant had been able to give a clear account of the circumstances surrounding the assault, but she was less sure of whether the adjacent classroom was occupied at the time of the incident.

In respect of (b), he noted that it would appear that only 'very young (pre school) children' are so egocentric that they are unable to be objective concerning the truth,

---

[106] JR Spencer and R Flin (1993) (n 7)
[107] *S v S* (supra) (n 85) at 54h-i
[108] *S v S* (supra) at 55b

and that egocentricity is not a problem unique to children.[109]

In respect of (c), he noted that research had shown that children, like adults were suggestible. In the matter before him, there was in any event no indication that evidence was adduced by way of suggesting to the complainant or her young friend who had also testified, how they should answer questions.[110]

In respect of (d), the judge emphasised the point that 'children do not fantasise over things that are beyond their own direct or indirect experience.'[111] With reference to the complainant's graphic and realistic description of the rape incident, he found that it was simply not the type of story that 'could credibly emerge from the fantasy of an eleven year old girl.[112]

In respect of (e), his comments were confined to rape cases. The learned judge was somewhat reluctant to outwardly dismiss the assumption that allegations of rape are fundamentally suspect. The assumption has however, as mentioned earlier,[113] subsequently been found to have no rational basis, and has been dismissed by the Supreme Court of Appeal.[114] Ebrahim, J noted that the over-emphasis of fantasy is not justified, and that in each case, 'it is a question of credibility rather than a matter of *all*

---

[109] *S v S* (supra) at 55f
[110] *S v S* (supra) at 55i and 56b
[111] *S v S* (supra) at 57b
[112] *S v S* (supra) at 57b-e
[113] See page 29
[114] *S v J* (supra) (n 76)

complainants in sexual abuse cases being required to show a greater quantum of proof than in any other type of case.'[115]

In respect of (f), he noted that the assumption that children do not understand the duty to tell the truth is a gross generalisation that ignores the differences in age, intelligence and morality between children.[116]

In commenting on the general validity of each of the traditional objections, the learned judge tested the evidence of the complainant against each one individually. He found that the magistrate had not erred in his finding and the appeal was dismissed in its entirety.

The judgement has been referred to as 'refreshingly pragmatic.'[117] It must be welcomed because of its call for a new approach to assessing children's evidence. The judgement clearly and sensibly advocates that the decision as to the credibility of a child witness should be a rational one. Decisions regarding the credibility of adult witnesses are only arrived at after a thorough analysis of all the evidence. Why should it be any different for children?

A thorough evaluation of a child's evidence may well involve a judicial officer having to be aware of and to apply relevant information concerning the cognitive ability of

---

[115] *S v S* (supra) at 57h-j
[116] *S v S* (supra) at 59f
[117] PJ Schwikkard 'Recent Cases' (1995) 8 *SACJ* 93

children. This case has undoubtedly indicated the value of applying such knowledge to the decision making process. The point is simply that the testimony of children has become common place in our adult courtrooms. The traditional rules of evidence and procedure need to be adjusted to suit the specific needs of the child.

IV. THE CONSTITUTIONAL ARGUMENT

Specific children's rights have been entrenched in section 28 of the 1996 Constitution of South Africa. (The Constitution).[118] One of these, is the right to be 'protected from maltreatment, neglect, abuse or degradation'.[119] Davis, Cheadle and Haysom argue that this right is aimed against 'executive or administrative action or legislation that renders children vulnerable to neglect or abuse.'[120] These rights will probably have no direct impact on the rules of evidence, but by being incorporated in a human rights instrument, they draw attention to the fact that children deserve special protection, and that they are as deserving of rights as adults.

Section 9(1) of the South African Constitution provides as follows:

> 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

---

[118] Act No 108 of 1996
[119] Section 28(1)(d) of Act 108 of 1996
[120] Davis, Cheadle, Haysom *Fundamental Rights in the Constitution – Commentary and Cases* (1997) 270

Somewhat similarly, section 15(1) of the Canadian Charter of Rights and Freedoms reads:

> 'Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.'

In *Andrews v Law Society of British Colombia*[121] the court discussed the purpose of the above-quoted equality clause in the Charter, and found that it requires that each person be accorded equal concern and respect both in the formulation and the application of the law.[122] It is furthermore stressed in the judgement that constitutional equality rights were designed to protect disadvantaged groups in society.

The South African Constitutional Court has held that the guarantee of equality 'entitles everybody, at the very least, to equal treatment by courts of law.'[123] In relation to criminal trials, the equality clause (section 9(1)), and the clause which protects the right of an accused to a fair trial (section 35(3)), are mutually reinforcing.[124]

---

[121] [1989] 1 SCR 143, 56 DLR (4th) 1
[122] *Andrews* (supra) at 15
[123] Per Didcott J in *S v Ntuli* 1996 (1) BCLR 141 (CC) at para 19; *Prinsloo v Van der Linde* 1997 (6) BCLR 759 at para 22
[124] *S v Ntuli* (supra) at paras 18-20

The question that now remains to be answered is whether the application of the competency requirement and the cautionary rule in cases involving child witnesses has a place in our new constitutional democracy. Since the final Constitution applies to all law and binds the legislature, the executive, the judiciary and all organs of state, the argument whether or not rules of common law are immune from constitutional scrutiny is no longer relevant.[125] The recognition of rights and freedoms in the Constitution means that rules such as the cautionary and the competency rules can no longer be accepted without question. If such rules affect the enjoyment of rights contained in the Bill of Rights adversely, they will have to meet the limitations criteria.

In terms of sections 9(3) and 9(4) of the Constitution, individuals are safeguarded from discrimination, whether direct or indirect, on the grounds of *inter alia*, age. In as far as the competency rule and cautionary rule of application are capable of reference exclusively to children, and in view of the historical origins of each rule, as discussed earlier in this paper, it is argued that these rules patently discriminate against children as a class of persons. The system discriminates against this group by directing presiding officers to remind themselves that children are more likely to fabricate charges and give unreliable evidence than other complainants. To date there has been no rational reason put forward for this collective judicial wisdom. In the absence of such a reason it is impossible to conclude that this cautionary rule does not fall foul of section 9(1) of the Constitution.

[125] In terms of sections 8(3); 172 and 173 of Act 108 of 1996, the High Courts, the Supreme Court of Appeal, and the Constitutional Court are empowered to develop the common law in the light of constitutional provisions and values.

Both rules fundamentally offend against the equality of child complainants before and under the law. They constitute an open challenge to the time honoured principle that each case should be determined on its own merits, and whether the merits of the evidence establishes the commission of the offence beyond a reasonable doubt. They accomplish this by enjoining the law not to view the complainants as individuals, with their own individual propensity either to be truthful or untruthful in their manner of testifying.

In addition, not only are these rules insulting and discriminatory to child victims of sexual crimes, but they are functionally superfluous. Section 35(3) of the Constitution guarantees every accused person the right to a fair trial, which includes the right to be presumed innocent. The effect of this is that every accused person is presumed innocent until proven guilty, the onus being on the state to prove the guilt of the accused beyond reasonable doubt. The accused does not have to prove anything and merely has to raise a reasonable doubt in the event of the prosecution establishing a prima facie case. This constitutional provision provides real and adequate protection to the accused against wrongful conviction. Furthermore there exists at common law, the cautionary approach of application in respect of single witnesses, and identification evidence. The overwhelming majority of complainants in sexual abuse cases (be they children or adults), are single witnesses, as the offence concerned is not committed in full view of onlookers. The legitimate rights of an accused are more than adequately protected. When taking these factors into consideration it is impossible to think of

circumstances in which the cautionary rule could be considered a reasonable and justifiable infringement on the equality clause.

Not only does the Constitution empower courts to develop the common law and interpret legislation in accordance with the right to the principle of equality,[126] but it also requires that the courts, when developing the common law, embark upon the task 'taking into account the interests of justice.'[127]

The cautionary rule can be said to actively defeat the interests of justice. It fosters and regularly reinforces the impression (because of the suspicion with which the law regards the evidence of children in sexual abuse cases), that it is considerably more difficult to prove these offences than would be the case with an adult complainant. In this regard the high incidence of sexual abuse of children should be noted. In as much as this rule, together with the competency requirement, contributes towards the failure of parents and guardians to report sexual abuse of children, it is responsible for the failure of the system to protect its most vulnerable citizens against abuse. An allied consequence of this is that the interests of justice are further prejudiced, in that the perpetrators of the crimes which go unreported are not brought before courts, tried, and where appropriate, punished for their actions. This latter aspect may reasonably be said to encourage the belief in the minds of such perpetrators (especially those who abuse

[126] Section 39 of Act 108 of 1996
[127] Section 173 of Act 108 of 1996

young children), that there is every chance that crimes of this nature will go undetected. This in turn has disastrous consequences for the image of the law as, *inter alia,* an instrument of deterrence to actual and would be offenders and a source of protection for those citizens who have been wronged. Finally the inequality of the child victim is institutionalised, and the message is conveyed to society that the rights of these persons are less jealously protected than those of their abusers.

We can only hope that it will be sooner rather than later that our courts of law will rise to the task enjoined them by the Constitution, and be more proactive in refashioning our legal system.

V CONCLUSION

It is time that our criminal courts hear young victims of crime, who are able to communicate in an understandable way. Factors such as their age or immaturity should have bearing on the reliability and not the admissibility of their evidence.

The competency rule as it has evolved in cases of child witnesses, serves no purpose other than to exclude potentially understandable and reliable testimony on the commission of a serious crime. There is no rational basis for its existence, and it should not form part of our law.

Equally prejudicial and superfluous is the cautionary rule applicable to the evidence of children. The underlying assumption inherent in this rule is that the testimony of children is unreliable. The rule serves to unjustly discriminate against young victims of crime, simply because of their age. In so doing, it falls foul of the constitutional commitment to equality. This rule too has no place in our constitutional democracy.

The abolition of these ancient and discriminatory rules of evidence and procedure will not mean that the unreliable testimony of a child cannot be rejected, or that an application of caution cannot be called for where children give evidence. Where fabrication is suggested, or where it appears from the evidence that the child's testimony is unreliable, it will have to be carefully considered by the court, just as it would be, were the complainant an adult. At the end of the day the ultimate test remains proof beyond reasonable doubt. The point is simply, that the evidence in a particular case may call for a cautionary approach, but, in the words of Olivier JA, 'this is a far cry from the application of a general cautionary rule.'[128]

Until such time as we abolish the competency requirement and the cautionary rule, we will continue 'to institutionalise the inequalities'[129] between abused children and their adult assailants, and we fail in our duty to guard the rights and interests of those who cannot fend for themselves.

---

[128] *S v J* (supra) (n 76)
[129] DJ Birch 'Children's Evidence' (1992) *Crim LR* 262 at 269

BIBLIOGRAPHY

Journals

1. D J Birch 'Corroboration in Criminal Trials: a Review of the Proposals of the Law Commission's Working Paper' (1990) *Crim LR* 667

2. D J Birch 'Children's evidence' (1992) *Crim LR* 262

3. V Bronstein 'The cautionary rule: an aged principle in search of contemporary justification' (1992) 8 *SAJHR* 558

4. H Combrink 'Monsters under the bed: challenging existing views on the credibility of child witnesses in sexual offence cases' (1995) 8 *SACJ* 327

5. JC Hammond and E Hammond 'Justice and the Child Witness' (1987) 11 *SACC* 3

6. S Jagwanth and P J Schwikkard 'An unconstitutional cautionary rule' (1998) 11 *SACJ* 87

7. McEwan 'Child evidence: more proposals for reform' (1988) *Crim LR* 813

8. McEwan 'In the Box or on the Box? The Pigot Report and child witnesses' (1990) *Crim LR* 363

9. P Mirfield 'Corroboration after the 1994 Act' (1995) *Crim LR* 488

10. K Muller and M Tait 'Are children beheaded and fed to wild animals? A study of the perceptions of South African children relating to the judicial process' (1998) 116 *SALJ* 447

11. K Muller and M Tait 'A prosecutor is a person who cuts off your head': Children's perceptions of the legal process (1997) 114 *SALJ* 593

12. H Oosthuizen and T Verschoor 'Jeugdigheid by getuienislewering en verhoorbaarheid' (1996) 9 *SACJ* 22

13. P J Schwikkard 'The child witness: assessment of a practical proposal' (1991) 4 *SACJ* 44

14. PJ Schwikkard 'Recent Cases (1995) 8 *SACJ* 93

15. P J Schwikkard 'The abused child: A few rules of evidence considered' (1996) *Acta Juridica* 148

16. P Zief 'The child victim as witness in sexual abuse cases-a comparative analysis of the law of evidence and procedure' (1995) 4 *SACJ* 21

Books

17. Cross and Tapper *Cross and Tapper on Evidence* 8ed (1995) Butterworths

18. Cross & Wilkin *Outline of the Law of Evidence* 7ed (1996) Butterworths

19. Chaskalson Kentridge et al *Constitutional Law of South Africa* (1996) Juta

20. Davis, Cheadle, Haysom *Fundamental Rights in the Constitution – Commentary and Cases* (1997) Juta

21. Du Toit et al *Commentary on the Criminal Procedure Act* (1987) Juta

22. LH Hoffman and DT Zeffert *The South African Law of* Evidence 4ed (1988) Butterworths

23. R May *Criminal Evidence* 2ed (1990) Sweet and Maxwell London

24. P Murphy *Murphy on Evidence* 5ed (1995) Blackstone Press Limited London

25. Schwikkard, Skeen and Van Der Merwe *Principles of Evidence* (1997) Juta

26. J R Spencer and R Flin *The Evidence of Children. The law and the psychology* 2ed (1993) Blackstone Press Limited London

27. JR Spencer (Ed) G Nicholson (Ed) *Children's Evidence in Legal Proceedings: An International Perspective* (1989) Papers from an International conference Selwyn College Cambridge 26-28 June 1989

Case Law

28. *Rex v Umhlahlo and Nokusa* 1904 NLR 264

29. *R v Bell* 1929 CPD 478

30. *R v W* 1949 (3) SA 772 (A)

31. *Rex v Manda* 1951 (3) SA 158 (A)

32. *R v D and others* 1951 (4) SA 450 (A)

33. *R v J* 1958 (3) SA 699 (SR)

34. *R v Nhleko* 1960 (4) SA 712 A

35. *S v Avon Bottle Store (Pty) Ltd* 1963 (2) SA 389 (A)

36. *S v Mgengwana* 1964 (2) SA 149 (C)

37. S *R v Hlapezula & others* 1965 (4) SA 439 A

38. *R v J* 1966 (1) SA 88 (R)

39. *S v Masuku* 1969 (2) SA 375 (N)

40. *S v L* 1973 (1) SA 344 (C)

41. *S v Mthetwa* 1973 (3) SA 766 (A)

42. *S v T* 1973 (3) SA 794 (A)

43. *S v B* 1976 (2) SA 54 (C)

44. *Woji v Santam* 1981 (1) SA 1020 (A)

45. *S v F* 1989 (1) SA 460 (ZHC)

46. *Andrews v Law Society of British Colombia* [1989] 1 SCR 143, 56 DLR (4th)

47. S *v Francis* 1991 SACR 198 (A)

48. *S v Mashava* 1994 (1) SACR 224 (T)

49. *S v S* 1995 (1) SACR 50 (ZS)

50. *R v Makanjuola; R v Easton* [1985] 3 All ER 730

51. *S v Ntuli* 1996 (1) BCLR 141 (CC)

52. *S v N* 1996 (2) SACR 225

53. *Prinsloo v Van de Linde* 1997 (6) BCLR 759 (CC)

54. *S v V* 1998 (2) SACR 651 (CPD)

55. *S v J* 1998 (2) SA 984 (SCA)

Legislation

56. The Criminal Procedure Act No 51 of 1977 (South Africa)

57. Chapter 33 of the Criminal justice and Public Order Act 1994 (England)

Other

58. South African Law Commission Issue Paper 10 (Project 108) Sexual Offences Against Children (31 May 1998)

59. South African Law Commission Issue Paper 13 (Project 110) The Review of The Child Care Act (18 April 1998)